General Court of the European Union
PRESS RELEASE No 68/16
Luxembourg, 28 June 2016

Judgments in Cases T-208/13, Portugal Telecom SGPS, SA v Commission, and T-216/13, Telefónica, SA v Commission

Press and Information

The General Court confirms the unlawfulness of the clause relating to non-competition between Portugal Telecom and Telefónica in connection with Telefónica's acquisition of the Brazilian mobile operator Vivo

However, for the purposes of calculating the fines imposed on the two companies, the Commission will have to determine once again the sales linked directly or indirectly to the infringement

PT (formerly Portugal Telecom) and Telefónica are incumbent operators in the area of electronic communications. PT is the primary telecommunications operator in Portugal and has a strategic presence in other countries, in particular in Brazil and in sub-Saharan Africa. Telefónica is the primary telecommunications operator in Spain and one of the largest European telecommunications groups, with an international presence in several countries of the EU, Latin America and Africa. Vivo Participações ('Vivo') is one of the main mobile telecommunications operators in Brazil. Vivo was jointly controlled by Telefónica and PT via Brasilcel, a Dutch investment company.

In 2010, PT and Telefónica concluded a share-purchase agreement which had as its subject-matter the exclusive control of Vivo by Telefónica.[1] In that agreement, the operators inserted a non-competition clause by which they undertook, 'to the extent permitted by law, to refrain from participating or investing, directly or indirectly, through any subsidiary, in any project falling within the telecommunications sector (including fixed telephone and mobile telephone services, internet access services and television services, with the exception of any investment or any activity in progress on the day on which the present agreement is signed) which is liable to be in competition with the other company on the Iberian market'. That clause was to apply between 27 September 2010 (date of the final conclusion of the transaction) and 31 December 2011.

In January 2011, after having been alerted to the existence of that clause by the Spanish competition authority, the Commission initiated a procedure against Telefónica and PT. In February 2011, following the initiation of the procedure by the Commission, Telefónica and PT signed an agreement with a view to removing the clause. In a decision of 2013,[2] the Commission took the view that the clause amounted to a market-sharing agreement with the object of restricting competition in the internal market. It accordingly imposed on Telefónica and on PT fines amounting to €66 894 000 and €12 290 000 respectively. The Commission concluded that the clause applied to all markets for electronic telecommunications services and television services in Spain and in Portugal ('the Iberian market'), with the exception of worldwide markets for the provision of telecommunications services and services for the international carriage of goods. The Commission added that the clause was liable to delay integration in the electronic communications sector. According to the Commission, that integration would be seriously compromised if incumbent operators such as Telefónica and PT were able to strengthen their already very strong market position by protecting their home markets and by preventing the entrance of other operators onto those markets.

[1] The agreement was concluded on 28 July 2010. Telefónica obtained exclusive control of Vivo thanks to the acquisition of 50% of Brasilcel's capital.
[2] Commission Decision C(2013) 306 final of 23 January 2013 relating to a proceeding under Article 101 TFEU (Case COMP/39.839 — Telefónica/Portugal Telecom).

PT and Telefónica request the General Court to annul the Commission decision and to reduce the amount of the fines imposed. They dispute, in particular, the finding that the clause constitutes a restriction of competition by object since the Commission did not demonstrate that they were potential competitors and that the clause was therefore capable of restricting competition. They also claim that it is necessary to exclude from the calculation of the fines the volume of sales achieved on the markets or by means of services not subject to potential competition which did not come within the scope of the clause.

By today's judgments, **the General Court dismisses, almost in their entirety, the actions brought by PT and Telefónica. However, the Commission will have to determine once again the sales linked directly or indirectly to the infringement in order to calculate the amount of the fines.**

The General Court finds that PT failed to demonstrate that the restriction introduced by the clause at issue was incidental to the option of purchasing its shares held by Telefónica (an option initially provided for and later eliminated from the agreement) and to the resignation of the members of its Management Board appointed by the Spanish company (a resignation provided for in the final version of the agreement). In addition, the General Court considers, like the Commission, that there is nothing to indicate that the clause contained a self-assessment obligation on which the entry into force of the non-competition obligation depended (PT submitted that the clause contained two separate obligations — a main self-assessment obligation and a secondary non-competition obligation — the second becoming binding only if its lawfulness was established during the exercise of the first).

For its part, Telefónica claims inter alia that the clause was imposed by the Portuguese Government or that it was in any event necessary for it to refrain from blocking the agreement relating to the Vivo operation. Telefónica claims that it therefore had no other choice than to work on limiting the impact of the clause by transforming it into a clause self-assessing the lawfulness of a non-competition undertaking by the introduction of the phrase 'to the extent permitted by law'. The Court finds that Telefónica did not adduce sufficient evidence in support of those claims. In addition, it points out that Telefónica did not provide any information capable of explaining why a clause providing for non-competition on the Iberian market might be considered to be objectively essential for a transaction relating to the takeover of shares in a Brazilian operator.

Regard being had to the fact that the very existence of the clause is a strong indication of potential competition between PT and Telefónica, that its subject matter consisted of a market-sharing agreement, that it had a wide scope and that it was part of a liberalised economic context, the Court takes the view that **the Commission was not obliged, as PT and Telefónica assert, to undertake a detailed analysis of the structure of the markets concerned and of potential competition between companies on those markets in order to conclude that the clause constituted a restriction of competition by object.**

However, the Court states that, in the present cases, sales of a company corresponding to activities that are not capable of being in competition with the other company over the period of application of the clause must be excluded for the purposes of calculating the fine, since those activities were excluded from the scope of the clause by virtue of its actual wording and that, in order to calculate the fines, the Commission relied on sales coming within the scope of the clause. Thus, in order to determine the value of the companies' sales to be taken into consideration for the calculation of the amount of the fines, the Commission was required to examine the arguments of PT and Telefónica seeking to establish that there was no possibility of competition between them with regard to certain services. Only on the basis of such a factual and legal analysis would it would have been possible to determine the value of the sales linked directly or indirectly to the infringement (a value serving as a starting amount for the calculation of the basic amount of the fines in accordance with the calculation method applied by the Commission in the present cases). **The Commission will therefore have to make a fresh finding with regard to determination of the amount of the fines.**

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

The full texts T-208/13 and T-216/13 of the judgments are published on the CURIA website on the day of delivery

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